



OFFICE OF LEGAL AFFAIRS

MEMORANDUM

**To:** 1611 Open Rulemaking File  
**Through:** Victor M. Fortuno, General Counsel & Vice President for Legal Affairs  
**From:** Mattie C. Condray, Senior Assistant General Counsel  
**Date:** August 25, 2004  
**Subject:** Summary of Meeting with Linda Perle

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On August 23, 2004, LSC representatives<sup>1</sup> met with Linda Perle, Senior Staff Attorney Legal Services, Center for Law and Social Policy and Counsel to the National Legal Aid and Defenders Association to discuss LSC Management's recommendations to the LSC Operations & Regulations Committee regarding two issues involved in the Corporation's ongoing open rulemaking to consider revisions to LSC's financial eligibility regulations at 45 CFR Part 1611. Specifically, LSC representatives discussed with Ms. Perle the eligibility of groups for LSC-funded legal assistance and the requirement that recipients execute retainer agreements with their clients. The discussions are summarized below.

***Retainer Agreements***

A draft redline version of proposed changes to the existing retainer agreement requirement was shared with Ms. Perle (copy attached). Ms. Condray provided a brief overview of the contents of the draft, explaining Management's recommendations. Ms. Perle noted that, not having had a previous opportunity to review the draft redline or discuss it with members of NLADA, she was providing her personal views on the draft. Ms. Perle indicated that she believed the field would continue to oppose any regulatory provisions requiring the execution of retainer agreements in extended service cases or written documentation on the scope of services in brief service cases. She also indicated, however, that if some requirement is necessary, the Management proposal was better than previous proposals.

A discussion was held regarding the current requirement's listing of specified elements to be included in the retainer agreement. It was agreed that in eliminating the prior approval requirement (for retainer agreements), it becomes important for the regulation to be more explicit about what elements must be included. It was further agreed, however, that the current list could be ambiguous and would be better focusing on the key elements of the retainer – namely the nature of the legal problem for which assistance is sought and the scope of services being

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<sup>1</sup> Helaine M. Barnett, President; Victor M. Fortuno, General Counsel and Vice President for Legal Affairs, John C. Eidleman, Acting Vice President for Compliance and Administration; Michael Genz, Director, Office of Program Performance and Mattie C. Condray, Senior Assistant General Counsel.

provided.. Finally, it was agreed that it would be prudent to include language in the preamble that might suggest other information, such as a reference to the client grievance procedures, which a recipient would want to communicate with a client about, but which need not necessarily be included in the retainer agreement and to encourage grantees to seek review of retainer agreements by LSC in instances in which they had any questions.

### ***Group Representation***

A draft redline version of proposed changes to the existing group representation requirements was shared with Ms. Perle (copy attached). Ms. Condray provided a brief overview of the contents of the draft, explaining Management's recommendations. Ms. Perle noted that, not having had a previous opportunity to review the draft redline or discuss it with members of NLADA, she was providing her personal views on the draft.

There was a discussion of Management's draft proposal to recommend that the group eligibility provisions of 1611 permit the representation of groups which have as their primary activity the provision of services to persons who would be eligible for LSC-funded legal assistance, but not representation of groups which have as their primary function the furtherance of the interests of persons who would be eligible for LSC-funded legal assistance. Ms. Perle noted that the Management proposal, although more limited than what the field has been advocating, was expanded over prior Management proposals and, as such, was preferable to such prior proposals. She also expressed the view that the proposal was clear, but suggested that the draft regulatory language should include reference to the primary composition of non-membership groups and the applicability of the eligibility requirements only to LSC-funded legal assistance. It was agreed that the proposed draft text could be modified to incorporate these suggestions.

### **Attachments**

**REDLINE VERSION –MANAGEMENT RECOMMENDATIONS  
(6/04) ON RETAINER AGREEMENTS AND GROUP  
REPRESENTATION COMPARED TO CURRENT 1611  
PROVISIONS**

***Definitions***

*Management recommends the amending the definitions section, Section 1611.2, Definitions, to add new definitions relating to the retainer agreement requirement at (a), (b), (e) and (f):*

**Section 1611.2 Definitions.**

(a) “Advice and counsel” means legal assistance that is limited to the review of information relevant to the client’s legal problem(s) and counseling the client on the relevant law and/or suggested course of action. Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client.

(b) “Applicable rules of professional responsibility” means the rules of ethics and professional responsibility generally applicable to attorneys in the jurisdiction where the recipient provides legal services.

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(e) “Brief services” means legal assistance in which the recipient undertakes to provide a discrete and time-limited service to a client beyond advice and consultation, including but not limited to activities, such as the drafting of documents or making limited third party contacts on behalf of a client.

(f) “Extended service” means legal assistance characterized by the performance of multiple tasks incident to continuous representation. Examples of extended service would include representation of a client in litigation, an administrative adjudicative proceeding, alternative dispute resolution proceeding, extended negotiations with a third party, or other legal representation in which the recipient undertakes responsibility for protecting or advancing a client’s interest beyond advice and counsel or brief services.

## ***Retainer Agreements***

*Management proposes revising the existing retainer agreement provision as follows (please note that the revised section on retainer agreements would be renumbered because of other proposed changes to other sections of the rule):*

### **Section 1611.87 Retainer agreements.**

(a) ~~When a recipient provides extended service to a client, the~~ A recipient shall execute a written retainer agreement ~~with the client, in a form approved by the Corporation, with each client who receives legal services from the recipient. The retainer agreement shall be executed when representation commences (or, if not possible owing to an emergency situation, as soon thereafter as is practicable),~~ Such retainer agreement must be in a form consistent with the applicable rules of professional responsibility and prevailing practices in the recipient's service area and shall include ~~and shall clearly a statement~~ identifying the relationship between the client and the recipient, the ~~matter~~ legal problem for in which representation is sought, the nature of the legal services to be provided, and the rights and responsibilities of the client ~~with respect to the attorney-client relationship. The recipient shall retain the executed retainer agreement as part of the client's file, and shall make the agreement available for review by the Corporation in a manner which protects the identity of the client.~~

(b) (1) Except as provided herein, when a recipient provides brief services to a client, the recipient shall provide some written documentation to the client setting forth the scope of the representation.

(2) No written communication concerning the scope of services need be provided when doing so would jeopardize the safety of the client. The recipient shall keep a record of the information provided, that the information was provided to the client orally, and the reason it was necessary to provide the information orally.

(3) The written communication required under this paragraph may be provided after services have been provided to the client.

~~(b)~~ (c) A recipient is not required to execute a written retainer agreement ~~or provide written documentation on the limitations on the scope of~~

~~representation~~ when the only service to be provided is brief advice and ~~consultation~~ **counsel to the client.**

**(d) The recipient shall maintain copies of all retainer agreements and other documentation generated in accordance with this section.**

### ***Group Representation***

*Management proposes moving the existing group representation provision from its current position at §1611.5(c) to its own section dealing solely with group representation (which would be numbered as §1611.9), with certain proposed amendments. Under this approach, current §1611.5(c) would become §1611.9(a), with one amendment and new subsections (b) and (c) would be added as follows:*

#### **§1611.9 Representation of Groups**

**(a)** A recipient may provide legal assistance to a group, corporation, or association if it is primarily composed of individuals who are financially eligible for legal assistance under the Act **or if it has as its principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance,** and if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel.

**(b)** In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility requirements set forth herein.

**(c)** Nothing in this part prohibits a recipient from providing legal assistance to a group without regard to the eligibility of the group under this Part, if the legal assistance is supported by funds from a source other than LSC, and otherwise permissible under applicable law and regulation.

## COMPARATIVE DRAFT VERSIONS OF PART 1611 GROUP REPRESENTATION PROVISIONS (IN REDLINE VERSION COMPARED TO CURRENT 1611 PROVISIONS)

### *Draft Version One:*

#### **§1611.9 Representation of Groups**

(a) A recipient may provide legal assistance to a group, corporation, or association if:

(1) it is primarily composed of individuals who are financially eligible for legal assistance under the Act and if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel; or

(2) if it has as its principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance and if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel.

(b) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility requirements set forth herein.

### *Draft Version Two:*

#### **§1611.9 Representation of Groups**

(a) A recipient may provide legal assistance to a group, corporation, or association if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel and either:

(1) is primarily composed of individuals who are financially eligible for legal assistance under the Act and if; or

(2) has as its principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance.

(b) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility requirements set forth herein.

***Draft Version Three:***

**§1611.9 Representation of Groups**

(a) A recipient may determine a group, corporation, association or other entity to be financially eligible for legal assistance supported with LSC funds only if the group, corporation, association or other entity lacks and has not practical means of obtaining private counsel in the matter for which representation is sought and:

(1) at least a majority of the group's members are financially eligible for LSC-funded legal assistance; or

(2) for a non-membership group, at least a majority of the individuals who are forming or operating the group are financially eligible for LSC-funded legal assistance; or

(3) the group has as its principal function or activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance.

(b) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility requirements set forth herein.

(c) Nothing in this part prohibits a recipient from providing legal assistance to a group without regard to the nature or financial eligibility of the group, if the legal assistance is supported by funds from a source other than LSC, and otherwise permissible under applicable law and regulation.

***Draft Version Four:***

**§1611.9 Representation of Groups**

(a) A recipient may provide legal assistance to a group, corporation, or association if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel and either:

- (1) is primarily composed of individuals who are financially eligible for legal assistance under the Act and if; or
- (2) for a non-membership group, at least a majority of the individuals who are forming or operating the group are financially eligible for LSC-funded legal assistance; or
- (3) has as its principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance.

(b) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility requirements set forth herein.